

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL DEWAYNE COLEMAN,

Defendant-Appellant.

UNPUBLISHED

March 13, 2003

No. 237033

Wayne Circuit Court

LC No. 00-005824-01

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of assault with intent to commit murder, MCL 750.83. He was sentenced to six to fifteen years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant and the complainant, his companion's son, became engaged in a physical confrontation on the front lawn of the family home. The two men separated, and defendant entered the family home. The complainant was standing near his vehicle. Defendant returned from the house with a knife and stabbed the complainant in the chest. The knife broke in two, and the complainant was able to pull the blade out of his chest. The complainant struck defendant four to five times before being driven to the hospital. The complainant testified that he suffered a collapsed lung as a result of the stabbing and would have died without emergency surgery. Defendant went to the police department, where photographs of his injuries from the altercation were taken, and filed a complaint. Defendant's allegation of being physically assaulted by the complainant was not given the same case number as the stabbing case, and charges were not filed against the complainant based on defendant's allegations. Although discovery was requested by the defense, there was no indication that the prosecution knew of the existence of the photographs in the separate assault complaint file brought by defendant, and the photographs could not be located when requested at trial.

Defendant first alleges that there was insufficient evidence to support the assault with intent to murder conviction. We disagree. When reviewing a challenge to the sufficiency of the evidence to support a conviction, the appellate court reviews the evidence in a light most favorable to the prosecution. *People v Sherman-Huffman*, 466 Mich 39, 40; 642 NW2d 339 (2002). The Court must consider whether the evidence at trial justified a rational trier of fact in finding that the elements of the crime were proved beyond a reasonable doubt. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The elements of assault with intent to

commit murder are: (1) an assault; (2) with an actual intent to kill; (3) which, if successful, would make the killing murder. *Id.* The intent to kill may be proven by inference from any fact in evidence, and minimal circumstantial evidence is sufficient because of the difficulty of proving an actor's state of mind. *Id.*

Defendant contends that insufficient evidence of the intent to kill element of the assault with intent to murder conviction was presented at trial, and therefore, reversal of this conviction is required. Viewing the evidence in the light most favorable to the prosecution, *Sherman-Huffman, supra*, we conclude that defendant's challenge to the sufficiency of the evidence is without merit. Irrespective of the instigator of any assault or "tussling" that may have occurred, defendant entered the home and returned with a knife. Defendant could have used the telephone to call police, remained in the home to avoid any additional confrontation, or fled to his own car and driven away from the scene. Even defendant's companion, who attributed the initial assault to her son, noted that the complainant was preparing to leave the scene and was near his car. Instead, defendant came out of the home with a knife and stabbed the complainant. Other than defendant's own self-serving testimony, no other witness supported the theory that the complainant's "rage" caused him to run into the knife or that defendant utilized the knife in self-defense. The trial court rejected defendant's testimony that he utilized the knife in self-defense to cause the complainant to leave the property. This Court does not interfere with the trier of fact's determination of the credibility of the witnesses. *McRunels, supra*.¹ Defendant's challenge to the sufficiency of the evidence is without merit.

Defendant next alleges that the cumulative effect of errors denied him due process of law. We disagree. In order to reverse based on cumulative error, the errors must have been seriously prejudicial to warrant a finding that defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). There is no indication that defense counsel claimed prejudice or moved to dismiss the charges based on the failure to locate the photographs. Indeed, defendant was not entitled to dismissal because there was no claim that the evidence was deliberately lost or destroyed. See *People v Basemore*, 36 Mich App 256, 260; 193 NW2d 335 (1971). Furthermore, other evidence of the content of a photograph is admissible where the original has been lost or destroyed. MRE 1004. Both defendant and his companion testified regarding the nature of the injuries he received, and defendant's medical bills from his hospitalization were admitted at trial. Despite the loss of the photographs, defendant was able to introduce evidence of the extent of his injuries. Therefore, this claim of error is without merit.

Defendant next alleges that judicial bias and the trial court's failure to control the cross-examination of witnesses resulted in cumulative error. A party that challenges a judge for bias must overcome the heavy presumption of judicial impartiality. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). When the allegation of judicial bias allegedly arises due to opinions formed during the trial, bias or prejudice is not established unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible. *Id.* Critical comments ordinarily will not support a finding of bias or partiality. *Id.* There is no evidence that the trial court had any role in the first arrest of defendant because of an outstanding bench

¹ We note that defendant does not challenge the assault element of the crime. Furthermore, the complainant's testimony established that he suffered a collapsed lung, a life threatening injury.

warrant. The trial court also did not order the second arrest of defendant, but properly revised the conditions of bond to \$75,000 cash in light of defendant's continued delays. There is no indication that the trial court failed to police the cross-examination of witnesses. Rather, the trial court explained its policy of allowing witnesses to explain their answers and uniformly applied the policy to the witnesses for both the prosecution and the defense. The trial court's expressed unhappiness with the delays of trial caused by defendant do not support a finding of bias. *Id.* Accordingly, the challenge based on cumulative error is also without merit. *Knapp, supra.*

Defendant next alleges that his sentence violates the principle of proportionality. We disagree. A sentence in accordance with the legislative mandates is presumptively proportionate. *People v Marcus Davis*, 250 Mich App 357, 369; 649 NW2d 94 (2002). If a sentence falls within the guidelines, this Court may not consider a challenge to the sentence based exclusively on proportionality. *People v Pratt*, ___ Mich App ___; ___ NW2d ___ (2002) (Docket No. 228081); see also MCL 769.34(10). Because proportionality is the exclusive challenge raised to defendant's sentence, which fell within the guidelines, we do not consider the challenge. Nonetheless, based on defendant's prior assaultive history, the sentence was proportionate in light of the circumstances surrounding the offense and the offender.

Affirmed.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood